IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.11.2007

Coram:

The Honourable Mr.A.P.SHAH, CHIEF JUSTICE
and
The Honourable Mr.Justice V.RAMASUBRAMANIAN

O.S.A.No. 354 of 2007
and
M.P.No.5 of 2007

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1. The Regional Director,
Ministry of Company Affairs,
Shastri Bhavan, 5th Floor,
Haddows Road, Chennai - 600 006.

2. The Registrar of Companies,
Tamil Nadu, Chennai,
Shastri Bhavan, 2nd Floor,
No.26. Haddows Road,
Chennai - 600 006. …. Appellants

(Cause Tittle accepted vide orders
of Court dt.29.10.2007 made in M.P.No.1 of 2007)

Vs.

Cavin Plastics and Chemicals (P) Ltd.,
No.12, Cenotaph Road,
Chennai - 18. …. Respondent

Appeal filed under Order XXXVI Rule 1 of the O.S.Rules read with Clause 15 of the Letters Patent against the order dated 18.06.2005 passed in Company Petition No.90 of 2005.

For Appellants ::: Mr.S.Udayakumar

For Respondents ::: Mr.K.Ramasamy

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J U D G M E N T

(The Judgment of the Court was delivered by Hon'ble The Chief Justice)

Admit. Learned counsel appearing for the respondent waives service. By consent, the appeal is taken up for hearing.

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2. The Regional Director, Ministry of Company Affairs and the Registrar of Companies, Tamil Nadu have preferred this appeal against the order of the learned Company Judge sanctioning a Scheme of Amalgamation between the respondent/Transferor Company/M/s. Cavin Plastics and Chemicals (P) Limited and the Transferee Company namely, M/s.Cavinkare Private Limited.

3. Before the learned Company Judge the appellants raised an objection to Clause 13.2 of the Scheme, which provides that the filing fee already paid by the Transferor Company on its Authorised Share Capital shall be deemed to have been so paid by the Transferee Company on the combined Authorised Share Capital. The contention of the appellants is that the Authorised Share Capital of the Company could be increased only after following the procedure prescribed under the relevant provisions of the Companies Act, 1956, and on payment of requisite fees to the Registrar of Companies. The learned single Judge overruled the objection and sanctioned the Scheme of Amalgamation.

4. Mr. S.Udayakumar, learned senior Central Government Standing Counsel appearing for the appellants, contended that Section 97 of the Companies Act (in short 'the Act') mandates that any company having a share capital increases its Share Capital beyond the Authorized Share Capital, it shall file with the Registrar a notice of increase of capital within thirty days of passing the resolution and pay the registration fees. He contended that there is nothing in Sections 391 to 394 of the Act, which carves out an exception to the compliance of Section 97 of the said Act. In support of this contention, he placed reliance on the decision rendered by a learned single Judge of the Bombay High Court in Anmol Trading Co.Ltd., v. Shaily Engineering Plastics Limited (2003) 113 Comp.Cases 107 (Bom.), as well as a decision of the learned single Judge of the Calcutta High Court in Areva T and D India Ltd., In re. (2007) 138 Comp.Cases 834 (Cal).

5. In reply, Mr.K.Ramasamy, learned counsel appearing for the respondent, submitted that with regard to increase of Authorized Share Capital by merger of the authorized capitals of the two companies, an order can be passed under Section 391 of the Act, and this very proposition has been laid down by the Bombay High Court in Vasant Investment Corporation Limited v. Official Liquidator, Colaba Land Mill Co.Ltd. 1995(51) Comp.Cases 20. Learned counsel further submitted that the decision in Vasant Investment Corporation Limited v. Official Liquidator, Colaba Land Mill Co.Ltd.,(supra) has been consistently followed in the judgments of the Andhra Pradesh, Delhi, Allahabad and Punjab Harayana High Courts. In this connection, he also referred to the decisions of this Court in Cavin Plastics and Chemicals Ltd., v. Cavinkare (P) Ltd., 2006(6) CLJ (Mad.)154, Aswin Poultry Farms (India) Ltd. In re. (2007) 138 Comp.Cases 505 (Mad.),

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and Bysani Consumer Electronics Ltd., In re. (2006) 134 Comp.Cases 99 (Mad.) 165.

6. The scope of Sections 391 to 394 of the Act was construed in the judgment of the Gujarat High Court in Maneckchowk and Ahmedabad Manufacturing Company Limited In re. (1970) 40 Comp.Cases 819 (Guj.) in respect of a proposed scheme for re-organization of the share capital including a reduction of capital. An objection was received to the effect that the Companies Act, 1956 envisaged a distinct procedure for effecting a reduction of capital or the case may be for increase of share capital, which was required to be independently followed. Hence, it was argued that it was not open to the Court to sanction a scheme involving a reduction or increase of share capital in the exercise of powers under Section 394 of the Act. The Court held that Section 391 was a complete code, which provided for the sanctioning of a scheme of compromise and arrangement. Rule 85 of the Companies (Court) Rules, 1959 specifically prescribes the procedure required to be followed where a proposed compromise involved a reduction of capital. Save and except for a situation envisaged in Rule 85, Section 391 was constituted as a separate and completed code in itself. The Court observed: -

> " ….If Section 391 was subject to other provisions of the Act, every time the scheme of compromise and arrangement is put forth for the sanction of the Court, if it includes things for which specific provisions are made and that will have to be gone through before the scheme is sanctioned, it would result in unnecessary duplication of procedure and would be cumbersome. On the contrary, it appears that if the creditors and members of the company arrive at a certain compromise which the court considers fair, it can be sanctioned under Section 391 despite the fact that for some of those things included in the compromise another procedure is prescribed in the Companies Act and which has not been carried out. It, therefore, appears that Section 391 is a complete code which provides for sanctioning of the scheme of compromise and arrangement…."

7. In Vasant Investment Corporation Limited v. Official Liquidator, Colaba Land Mill Co.Ltd.,(supra), the Bombay High Court held that except for a reduction of share capital which requires a special procedure to be followed under Rule 85, the procedure for carrying out alterations in the Memorandum and Articles of Association of a company prescribed by other provisions of the Companies Act, 1956 is not required to be followed before a scheme is sanctioned. The Court, further, held thus: -

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> " The whole purpose of Section 391 is to reconstitute the company without the company being required to make a number of applications under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme"

8. The above judgments were cited with approval in a subsequent judgment of Bombay High Court in PMP Auto Industries Limited In re. (1994) 80 Comp.Cases 289 (Bom.), wherein the learned single Judge summarized the position as follows: -

> " Section 391 invests the Court with powers to approve or sanction a scheme of amalgamation/arrangement which is for the benefit of the company. In doing so, if there are any other things which, for effectuation, require a special procedure to be followed - except reduction of capital - then the court has powers to sanction them while sanctioning the scheme itself. It would not be necessary for the company to resort to other provisions of the Companies Act or to follow other procedures prescribed for brining about the changes requisite for effectively implementing the scheme, which is sanctioned by the Court. Not only is Section 391 a complete code as held by the Courts, but, in my view, it is intended to be in the nature of a "single window clearance" system to ensure that the parties are not put to avoidable, unnecessary and cumbersome procedure of making repeated applications to the Court for various other alterations or changes which might be needed effectively to implement the sanctioned scheme whose overall fairness and feasibility has been judged by the Court under Section 394 of the Act."

9. The same view has been taken by the Allahabad High Court in Jaypee Granites Limited, In re. 2007 (74) SCL 118 (All.) holding that where a combined authorized capital of the amalgamated company does not exceed the authorized capital of the transferor and the transferee, no separate procedure for such merger of Authorized Share Capital is required to be followed nor is any further fee liable to be paid. The judgment of the Punjab and Harayana High Court in the case of Motorola India (P) Ltd. In re 2006 (73) CLA 1 also takes the same view. In the case of Saboo Leasing (P) Ltd., In re 2006 (4) Comp.Cases 553 (AP), a learned single Judge of the Andhra Pradesh

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High Court has held that the requirement of the notice to be furnished to the Registrar under Sections 95 to 97 of the Companies Act, 1956 was duly fulfilled when a certified copy of an order sanctioning a scheme under Sections 391 to 394 of the Act was filed by the Registrar. The learned single Judge concluded thus: -

> " Well, when the certified copy of the order sanctioning the scheme by this Court is required to be filed before the Registrar for the purpose of its registration, there is no reason as to why it shall not be treated as notice to the Registrar as envisaged under Sections 95 to 97 of the Companies Act. Inasmuch as, as discussed hereinabove, the object being the same, the necessary changes that are required to be made in the concerned register by the Registrar of Companies can be effected after receiving the certified copy of the order of this Court sanctioning the scheme. The sanction of the scheme by this Court has its own effect. It is not a mere act of the parties individually and volitionally. The scheme upon being sanctioned by this court, it becomes operational by virtue of the orders passé by this Court. In other words, by operation of law, such changes would come into effect. Therefore, it has statutory genesis and statutory character, but not mere individual acts of the companies. In that view of the matter, no separate notice informing the Registrar under Sections 95 to 97 of the Companies Act need be given, inasmuch as the scheme is required to be sanctioned by this court and such sanction is required to be registered with the Registrar of Companies by filing the certified copy of the order of this court."

The above view of the learned single Judge was confirmed by the Division Bench of the Andhra Pradesh High Court in Kemira Laboratories Ltd., In re. (2007) 77 SCL 174 (AP).

10. In the case of Hotline Hol Celdings Pvt. Ltd., In re. (2005) 127 Comp.Cases 165 (Del.), the Delhi High Court followed the decision of the Andhra Pradesh High Court in Saboo Leasing (P) Ltd., In re. (supra) while considering an objection of the Regional Director to the effect that the authorized share capital of the merged company was being increased as a result of the scheme of amalgamation and this could only be carried out after following the procedure prescribed by the relevant provisions of the Companies Act and held that in the case of such merger no such payment of fee to the Registrar of Companies or stamp duty to the State Government shall be payable.

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11. The decision of the learned single Judge of the Bombay High Court in Anmol Trading Co.Ltd., v. Shaily Engineering Plastics Limited (supra) relied upon by the appellants was found to be inconsistent with the various decisions rendered by Bombay High Court and subsequently followed in other decisions. In fact, the decisions in Vasant Investment Corporation Limited (supra) and PMP Auto Industries (supra) were not brought to the notice of the learned single Judge. The view expressed by the learned single Judge in Anmol Trading Co. Ltd case was expressly disapproved in a later judgment of the Bombay High Court in YOU Telecon India (P.) Ltd., In re, (2007) 77 SCL 161 (Bom.). The judgments of this Court in Cavin Plastics and Chemicals Ltd., v. Cavinkare (P) Ltd., (supra), Aswin Poultry Farms (India) Ltd. In re. (supra), and Bysani Consumer Electronics Ltd., In re. (supra) also reiterate the view taken in Vasant Investment Corporation Limited v. Official Liquidator, Colaba Land Mill Co.Ltd., (supra).

12. We have also gone through the decision of the Calcutta High Court in Areva T and D India Ltd., In re (supra) relied upon by the appellant. In the said judgment, the Calcutta High Court has held that the right to increase its paid up capital to its authorized limit, is a right unique to each company and incapable of being transferred, just as the fee paid for registration of the company is also incapable of being transferred and consequently, a separate fee would be payable under Section 95 read with 97 of the Act. We are unable to agree with the reasoning of the learned single Judge. The issue is not whether the fee, which is already paid by the Transferor company would automatically be transferred to the Transferee company. But, what is intended by Section 391 of the Act is to reconstitute the company without the company being required to make a number of applications under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme. Not only is Section 391 of the Act is a complete code in itself, but it is intended to be in the nature of a “single window clearance”.

13. In the circumstances, the appeal is dismissed. No costs. Consequently, miscellaneous petition is closed.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1.The Sub Asst. Registrar,
Original Side, Company Section,
High Court, Madras.

+1cc to Mr.S.Udayakumar, Advocate Sr 70581

AKR (CO)
km/21.1.

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